No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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American Central Insurance Company, National Fire Insurance Company of Hartford, Insurance Company of North America, National Union Fire Insurance Company of Pittsburg, Pa., Security Insurance Company of New Haven,

Appellants,

vs.

David Isaacs,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

Bert Schlesinger,
Leon E. Prescott,
Attorneys for Appellee.

Pernau-Walsh Printing Co.

No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

We beg leave to submit to the court the following recent decisions to be added to the brief for appellee, at the end of the first paragraph on page 39:

A PRINCIPAL WHO ADOPTS THE ACT OF ONE PROFESSING TO ACT FOR HIM, MUST ADOPT IT IN TOTO, AND WILL NOT BE PERMITTED TO CLAIM THE BENEFIT ARISING THEREFROM, AND AT THE SAME TIME REPUDIATE THE BURDEN THEREOF.

In the recent case of *Public Savings Ins. Co. of America v. Greenwald* (Jan. 30, 1918), 118 N. E. 558, the court said:

"It is well settled that a principal may ratify the unauthorized acts of his agent, and when so ratified such acts become as binding upon the principal as they would have been, had such agent been duly authorized in the first instance. 2 C. J. 519; Fouch v. Wilson (1877), 59 Ind. 93; United States etc. Co. v. Rawson (1886), 106 Ind. 215, 6 N. E. 337; Indiana etc. Co. v. Scribner, 47 Ind. App. 621, 93 N. E. 1014; Crumpacker v. Jeffrey, 115 N. E. 62.

The finding of the court for appellee was a finding of every material fact essential to his right of recovery, whether based on original authority in such agent to make such settlement, or on appellant's ratification of his unauthorized act. If there is any evidence to sustain such decision, it is sufficient on appeal, although it may be strongly contradicted and not entirely satisfactory. (Citing cases.) In determining whether there is any such evidence, this court must consider not only that which may be said to be direct, but also all reasonable inferences which the trial court may have drawn from the established facts. (Citing cases.)

An examination of the evidence discloses that appellee was the only witness who testified as to the circumstances and terms of such settlement, which was in effect substantially as we have stated. After he had testified and rested his case in chief, appellant offered no evidence to contradict appellee's evidence in that regard, but called its president to testify regarding other matters, * * *

It is well settled that, where a person has it within his power to produce a witness, presumably favorably disposed toward him, to explain a transaction, and fails so do to, the presumption is that the testimony if produced, would be unfavorable to him. Indiana etc. Co. v. Scribner, supra. Under all the circumstances the trial court would have been justi-

fied in finding that the facts with reference to such settlement were correctly shown by the evidence of appellee, and further justified in drawing the inference that appellant had full knowledge thereof soon after such settlement was made.

It has been held that ratification means the adoption of that which was done for and in the name of another without authority; that it is a question of fact, and ordinarily may be inferred from the *conduct* of the parties, including silence with knowledge of the facts, and knowingly *accepting benefits from an unauthorized act; that such knowledge, like other facts, need not be proven by any particular kind or class of evidence, but may be inferred from facts and circumstances;* and that ratification by corporations may be proven in like manner. National Life Ins. Co. v. Headrick, 112 N. E. 559; Indiana etc. Co. v. Scribner, supra. It is a general rule of agency that a principal, who adopts the act of one professing to act for him, must adopt it in toto, *and will not be permitted to claim the benefit arising therefrom, and at the same time repudiate the burden thereof.* Adams Express Co. v. Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279; Cleveland etc. R. Co. v. Blind, 182 Ind. 398, 105 N. E. 483; Hunt v. Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964; Reeves & Co. v. Miller, 48 Ind. App. 339, 95 N. E. 677.

It is not claimed *that appellant has returned or offered to return any of the benefits it received from such settlement. Under such circumstances, and the rules stated, the trial court may have found that such settlement had been ratified,* and by reason of such fact rendered judgment for appellee. There was substantial evidence tending to sustain such finding, and hence, under the well established rule, stated supra, we are bound thereby." (Italics ours.)

The evidence in the case at bar is conclusive that appellants have not offered to return any of the benefits received by them.

In the case of *Hudson v. Carlson,* (Jan. 2, 1918) 170 Pac. 102, the court said:

> "The notes were sent by Oscar Nelson to appellant for his indorsement in order that the deal might be closed, and he indorsed them, receiving therefor the full amount of principal and interest then due upon the same. * * *
>
> This was notice to appellant, her principal, and her consent to close the deal knowing this, coupled with the fact that appellant accepted the money and indorsed the notes, is sufficient to bind him. She was unquestionably acting within the apparent scope of her authority, and it is elementary that:
>
> > 'As between the principal and third persons the mutual rights and liabilities are governed by the apparent scope of the agent's authority, which is that authority which the principal holds the agent out as possessing or which he permits the agent to represent that he possesses and which the principal is estopped to deny.' 2 C. J. 570.
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> And likewise:
>
> > 'The fact that the agent's apparent authority is different from the actual authority conferred does not relieve the principal of responsibility.' 2 C. J. 573."

Dated, San Francisco,
March 12, 1918.

Respectfully submitted,

BERT SCHLESINGER,
LEON E. PRESCOTT,
Attorneys for Appellee.